No. 05-1631

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In The

Supreme Court of the United States

TIMOTHY SCOTT,
a Coweta County, Georgia, Deputy,

Petitioner,

v.

VICTOR HARRIS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. THIS COURT HAS JURISDICTION

Harris opens his brief by renewing his unsuccessful challenges to appellate jurisdiction in the Eleventh Circuit as well as in his brief in opposition to certiorari in this Court based on his reading of *Johnson v. Jones*, 515 U.S. 304 (1995). (Brief for Respondent at 1-3; Response to Petition for Certiorari at 10-12.) The Eleventh Circuit summarily rejected this claim in a footnote: "We reject Harris' first argument that we are without jurisdiction over this interlocutory appeal. This appeal goes beyond the evidentiary sufficiency of the district court's decision." (J.A. at 69 n.3.) His argument is similarly misplaced here.

A. Material Facts Are Reviewed De Novo

In qualified immunity cases, appellate jurisdiction exists to determine "whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions." *Johnson*, 515 U.S. at 312 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985)); *see also Behrens v. Pelletier*, 516 U.S. 299, 312-13 (1996). Because qualified immunity is effectively lost if a legally immaterial issue goes to trial, a defendant has a right to appeal de novo "whether an asserted federal right was clearly established at a particular time." *Elder v. Holloway*, 510 U.S. 510, 516 (1994); *see also Mitchell*, 472 U.S. at 527-28. Accordingly, the Court must first determine the material facts, which is itself a legal inquiry:

> [T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry

> of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In the qualified immunity context, this means that the "legal significance" of the material facts are reviewed de novo. *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 621 (5th Cir. 2006).

Materiality is distinct from whether there is a "genuine" issue of fact, which involves such matters as sufficiency of evidence to support legally material facts. *Anderson*, 477 U.S. at 248 ("The materiality inquiry is independent of and separate from the question of the incorporation of the evidentiary standard into the summary judgment determination.") This distinction is germane to qualified immunity appeals because evidentiary rulings are non-appealable prior to final judgment: "[T]he District Court's determination that . . . this case raised a *genuine issue of fact* concerning petitioners' involvement in the alleged beating of respondent was not a 'final decision' within the meaning of the relevant statute." *Johnson*, 515 U.S. at 313 (emphasis added). In contrast, a denial of qualified immunity because "material issues of fact remain" triggers appellate interlocutory jurisdiction:

> [R]espondent asserts that appeal of the denial of the summary-judgment motion is not available because the denial rested on the ground that "*material issues of fact remain.*" . . . Denial of summary judgment often includes a determination that there are controverted issues of material fact, and *Johnson* surely does not mean that *every* denial of summary judgment is nonappealable. *Johnson* held, simply, that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because

> they happen to arise in a qualified-immunity case. . . . *Johnson* reaffirmed that summary judgment determinations *are* appealable when they resolve a dispute concerning an "abstract issue of law" relating to qualified immunity – typically, the issue whether the federal right allegedly infringed was "clearly established."

Behrens, 516 U.S. at 312-13 (citations and punctuation omitted) (emphasis added); *see also Cottrell v. Caldwell*, 85 F.3d 1480, 1485 (11th Cir. 1996) ("*Behrens* specifically rejected the contention that a district court's holding that material issues of fact remain bars interlocutory appellate review of related issues of law, labeling that contention a misreading of *Johnson*.").

Johnson concerned the appealability of a summary judgment order that "determine[d] only a question of 'evidence sufficiency,' *i.e.*, which facts a party may, or may not, be able to prove at trial." 515 U.S. at 313; *see also id.* at 316 (noting that the issue is "the existence, or nonexistence, of a triable issue of fact"). The narrowness of the Court's decision in *Johnson* is underscored by the fact that the *only* issue on appeal was whether or not the defendants committed (or abetted) the battery at issue; "[w]hen asked at oral argument if they could lose the factual dispute and still prevail, defendants' lawyer answered no." *Jones v. Johnson*, 26 F.3d 727, 728 (7th Cir. 1994). Given the narrow factual dispute at issue, the court of appeals had no occasion to consider, much less decide, the *legal* question of whether the defendants violated any clearly established rights.

B. *Johnson* Does Not Apply

Harris contends that this Court lacks jurisdiction under *Johnson* because "Scott attempts to re-argue the material facts determined by the District Court and affirmed by the Court of Appeals in an attempt to manufacture a 'hazy border' under which he can claim the protection of qualified immunity." (Brief for Respondent at 3.) By doing so, Harris posits, Scott is questioning the "evidentiary sufficiency of the factual findings made by the District Court." (*Id.*)

Scott's appeal does not involve "a question of evidence sufficiency." Instead, Scott is arguing for precisely what this Court's qualified immunity precedents (including *Johnson*) allow: a de novo review of the lower courts' legal conclusions that the defendant violated clearly established law. *Behrens*, 516 U.S. at 313; *Johnson*, 515 U.S. at 313-14. For example, there can be no dispute that this Court has jurisdiction to review the legal conclusions that (a) "Scott did not have probable cause to believe that Harris had committed a crime involving the infliction or threatened infliction of serious physical harm," (J.A. at 76); (b) Scott lacked "probable cause to believe that [Harris] posed a substantial threat of imminent physical harm to motorists and pedestrians," (*id.* at 78); (c) "[b]y 2001, it was well-established . . . that 'deadly force' means force that creates a substantial risk of causing death or serious bodily injury," (*id.* at 88); (d) "ramming Harris' vehicle under the facts alleged here, if believed by a jury, would violate Harris' constitutional right to be free from excessive force during a seizure," (*id.* at 79); (e) "[a] reasonable police officer would have known in 2001 that a vehicle could be used to apply deadly force . . . and that [such] deadly force could not be used to apprehend a fleeing suspect unless

the conditions set out in *Garner* existed," (*id.* at 87); and (f) Scott received "'fair warning' that [his] conduct violates a constitutional right through a general constitutional rule." (*Id.*)

These conclusions stand in stark contrast to evidentiary rulings, many of which were captured here on videotape and uncontested, including that Harris was speeding; that Harris used turn signals as he veered across the double-line; that Harris did not hit anyone when he careened through red lights; that Scott did not know Harris's initial offense; that the two vehicles collided when Harris escaped from the parking lot; and that no one was in Harris's immediate path when contact was made. Conclusions as to the constitutionality of Scott's conduct in light of these undisputed facts go to the heart of interlocutory jurisdiction in qualified immunity cases, thereby allowing an immediate appeal in this case.[1]

II. SCOTT'S USE OF FORCE WAS CONSTITUTIONAL

Substantively, Fourth Amendment claims "are evaluated for objective reasonableness based upon the information the

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[1] *Johnson* acknowledged that "it may sometimes be appropriate to exercise 'pendent appellate jurisdiction'" in a qualified immunity appeal over a factual matter, but concluded it would be inappropriate to do so "where the appealable issue appears simply a means to lead the court to review the underlying factual matter." 515 U.S. at 318. Where, as here, the appeal focuses on the legal question of whether the evidence shows a violation of a clearly established constitutional right, a court may exercise pendent appellate jurisdiction over certain factual issues. Although petitioner does not believe it is necessary in this case, this Court could exercise pendent appellate jurisdiction to resolve the fundamental question of qualified immunity at this stage of the proceeding.

officers had when the conduct occurred." *Saucier v. Katz*, 533 U.S. 194, 207 (2001). This is so because "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). "Officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause . . . and in those situations courts will not hold that they have violated the Constitution." *Saucier*, 533 U.S. at 206.

Harris's arguments in this case hinge on the solitary assumption that *Garner*'s legal framework applies to Scott's use of force, and clearly so. *Garner* does not supplant *Graham*'s "totality of the circumstances" test, but instead applies *Graham*'s factors to the unique situation where a police officer shot an unarmed, nondangerous suspect in the back of the head for the sole purpose of preventing his escape. The suspect in that case was on foot and attempting to scale a fence when he was killed. *Garner* resolved that "[a] police officer may not seize an unarmed, nondangerous suspect by shooting him dead." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). It acknowledged that an "armed burglar would present a different situation," and expressly limited its holding to the facts at issue: "We hold that the statute is invalid insofar as it purported to give Hymon the authority to act as he did." *Id.* at 21-22.

A suspect using a vehicle to flee at high speeds presents a completely different challenge to law enforcement than an unarmed suspect on foot. By continuing to flee in a vehicle, the suspect does not merely seek to elude capture, but risks harming the public (intentionally or unintentionally) in the process. As a matter of constitutional

doctrine, the limitations on the use of force enunciated in *Garner* simply do not apply to the perils of vehicular flight. Stated otherwise, the risks presented by a driver determined to elude capture in an automobile, at high speeds and in the manner attempted by Harris, present unique exigencies that an officer cannot reasonably anticipate.

Harris insists a jury could find he was nondangerous because he stayed in control of his vehicle and did not try to run anyone off the road, Scott's path was "largely clear," and traffic was relatively light. (Brief for Respondent at 42-43.) Essentially, Harris urges that he was a "safe" reckless driver. This argument tracks the Eleventh Circuit's recognition that Harris "slowed for turns and intersections, and typically used his indicators for turns. He did not run any motorists off the road." (J.A. at 78.) It also ignores the undisputed facts, shown on the videotape, that there were motorists on the road and that Harris refused to even slow down in face of lawful commands to stop.

When Scott joined the pursuit, Harris had already failed to yield to Deputy Reynolds's flashing lights and siren; had passed motorists by crossing over double yellow traffic control lines at high speeds; and had raced through a red traffic light. (R. 36, Ex. A, 78-22:48, 78-22:44:36; R. 36, Ex. A, 66-22:45:10; R. 49 at 50; R. 36, Ex. 6.) After Scott responded to Reynolds's call for assistance, Harris tried to escape through the parking lot of a strip shopping center. Scott maneuvered his vehicle to block Harris's egress, but was unsuccessful. Once Harris's vehicle collided with his patrol car, Scott then personally witnessed Harris again racing down a two-lane road at high speeds, crossing double yellow control lines, and running a red light. (R. 36, Ex. A, 66-22:47; 66-22:47:55; 66-22:48:28.) It

was only at that point that vehicle contact was made to end the ongoing threat of harm to the public.

By then, Scott had exhausted less intrusive means, such as lights, sirens, engaging Harris in a pursuit, and attempting to block his exit from the drug store parking lot. "Authorities must be allowed 'to graduate their response to the demands of any given situation.'" *United States v. Montoya de Hernandez*, 473 U.S. 531, 542 (1985) (quoting *United States v. Place*, 462 U.S. 696, 709 n.10 (1983)). Harris was fairly warned that the police would steadily increase the force unless and until he complied with their lawful command for him to stop his vehicle.[2]

Harris's attempt to portray himself as a mere speeder to whom a citation might have been issued ignores *Graham*'s sharp admonition that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. A reasonable officer in Scott's position would view Harris as someone who had committed numerous offenses, was putting the public at serious risk by driving extremely recklessly on a two-lane road with other vehicles present, and made his unwillingness to stop repeatedly clear.

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[2] The district court stated that "a large part of the responsibility for the parking lot incident rests with Scott who deliberately drove into Harris's line of traffic." (J.A. at 50.) This statement suggests Harris had a right to defy the lawful commands to stop, which is contrary to precedent. *California v. Hodari D.*, 499 U.S. 621, 627 (1991) (noting that "compliance with police orders to stop should . . . be encouraged"); *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) ("Headlong flight – wherever it occurs – is the consummate act of evasion: It is not necessarily indicative or wrongdoing, but it is certainly suggestive of such.").

Harris's assumption that his high-speed vehicular flight is legally indistinguishable from *Garner*'s unarmed burglar on foot has no legitimate basis. Even though he did not injure anyone else during his escapade, Harris knowingly created a risk of harm, which is the definition of recklessness. *See* MODEL PENAL CODE § 2.02(2)(c) (recklessness is the knowing creation of a risk of harm). Because the risks of harm in this case cannot be likened to the absence of harm presented by an unarmed burglar on foot, *Garner*'s analysis of the use of force does not apply. Instead, *Graham*'s more general "totality of the circumstances" test applies, which accords discretion to officers to use force based on objectively reasonable beliefs as to the risks they are confronting.

Harris further assumes that Scott used deadly force, relying on alleged admissions in the deposition testimonies and, once again, on *Garner*. In relying on deposition testimony, Harris overlooks that (a) defense counsel properly objected to witnesses providing legal opinions; and (b) Scott has repeatedly contended in court documents that he did *not* use deadly force. (R. 48 at 157-58; R. 36 at 17; R. 59 at 3.) Further, Scott did not admit that he used deadly force. The actual question posed to Scott was whether "there was *a likelihood* that Victor Harris *could* be seriously injured or in a wreck due to the speed of the vehicles." (R. 48 at 157 (emphasis added).) In his brief before this Court, Harris alters this testimony to contend that Scott "knew that it *was likely* that Harris *would* be injured or killed." (Brief for Respondent at 19 (emphasis added).) As explained below, neither of these statements

articulates the correct Fourth Amendment standard, a legal matter to which Scott did not, and could not, admit.[3]

Harris's remaining basis for contending that Scott used deadly force is the Eleventh Circuit's reliance on *Garner*.[4] *Garner*, however, did not define "deadly force," nor did it need to: Officer Hymon used a firearm, which has been termed the "paradigmatic example of 'deadly force.'" *Gutierrez v. City of San Antonio*, 139 F.3d 441, 446 (5th Cir. 1998); *see also Ryder v. City of Topeka*, 814 F.2d 1412 (10th Cir. 1987); *Pruitt v. City of Montgomery*, 771 F.2d 1475 (11th Cir. 1985). "Lower courts since [*Garner*] have struggled with whether to characterize various police tools and instruments as 'deadly force.'" *Gutierrez*, 139 F.3d at 446. An oft-cited case in this context is *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988), where a police dog was dispatched to bite a suspected burglar who was hiding in a darkened building. Even though the suspect died as a result of the bite, the Sixth Circuit found no use of deadly force. In reaching that conclusion, the court acknowledged that "the mere recognition that a law enforcement tool is dangerous does not suffice as proof that the tool is an instrument of deadly force." *Id.* at 913. The court modified the Model Penal Code's definition of "deadly force," used for criminal law purposes, as follows:

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[3] Similarly, Harris claims that Scott's expert acknowledged "that deliberately ramming a vehicle at high speed constituted deadly force." (Brief for Respondent at 20.) To the contrary, the expert actually testified that "not every contact, including some ramming of a police vehicle to another vehicle, is deadly force." (R. 57 at 172.)

[4] In contrast, the district court expressly declined to decide whether Scott used deadly force, (J.A. at 47 n.6), finding that a jury should resolve whether his force was "objectively unreasonable" under *Graham*. (J.A. at 49.)

> [T]he two factors most relevant to the determination of whether the use of a particular law enforcement tool constitutes deadly force [are]: the intent of the officer to inflict death or serious bodily harm, and the probability, known to the officer but regardless of the officer's intent, that the law enforcement tool, when employed to facilitate an arrest, creates a substantial risk of causing death or serious bodily harm.

Id. at 912 (internal quotation marks omitted). The Ninth Circuit formulated a more restrictive standard: "force reasonably likely to kill." *Vera Cruz v. City of Escondido*, 139 F.3d 659, 660 (9th Cir. 1998), *overruled by Smith v. City of Hemet*, 394 F.3d 689 (9th Cir. 2005).[5]

Some circuits have not reached the issue at all, and even fewer have indicated just how "serious" a threat of bodily injury must be to qualify as "deadly force." The Model Penal Code defines a threat of serious bodily injury as presenting a "substantial risk of . . . serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." MODEL PENAL CODE § 210.0(3). Yet, dropping an explosive on a roof to gain entry to a building was not "deadly force" under *Garner*. *In Re City of Phila. Litig.*, 49 F.3d 945, 966 (3d Cir. 1995). Nor was a dog bite to the suspect's neck considered deadly force, even though dogs are trained to inflict bodily harm, and even though the bite killed the suspect. *Robinette*, 854 F.2d at 912-13.

What is clear is that Scott did not use deadly force under any of these definitions. Although Harris's injuries

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[5] This language mirrors the deadly force claim in *Brower v. County of Inyo*, 489 U.S. 593, 599 (1989), as force "likely to kill."

are severe, Scott's conduct was reasonably calculated under the circumstances to stop Harris, not kill him. Scott did not shoot at Harris or his vehicle. Despite the repeated characterizations of Scott's force as a "ramming," Scott did not crash into the car at a high speed differential or push Harris off the road. As the videotape shows, the road where the contact took place appeared (at night) to be level. (R. 36, Ex. A, 66-22:47:21.)

Even if Scott's conduct amounted to deadly force and the *Garner* conditions govern, his actions were constitutional. Harris disagrees and suggests that under *Garner*, the harm must be "immediate" before justifying deadly force. (Brief for Respondent at 17-18.) By so contending, Harris confuses the immediacy of the threat with the immediacy of the harm. *Garner* requires that the threat be immediate in the sense that the risk of harm is immediately apparent. It does not require that the harm is immediate, in the sense of a split-second away. *Garner* implements the concern that the threat must be immediate by requiring "probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Garner*, 471 U.S. at 3. The officer must have probable cause, which requires the officer to assess the seriousness of the threats that are immediately before him. *Cf. Arizona v. Hicks*, 480 U.S. 321, 326-27 (1987) (in the plain view context, equating the traditional requirement that the incriminating nature of an object must be "immediately apparent" with probable cause to believe that the item is incriminating).

Under *Garner*, a catastrophic harm need not be a split second away before the officer can act. A contrary rule would make it difficult (if not impossible) for an officer to comply with the Fourth Amendment when, as here, a use of force takes time for the officer to execute. The officer

might start to use force at one time only to find that the immediacy had waned at the moment of contact. Alternatively, the officer might not realize that force was needed immediately until it was too late.

In this case, Harris's reckless driving provided ample probable cause to believe that he presented an ongoing threat of serious physical harm under *Garner*. The threat was immediate: Scott personally observed it in the minutes and seconds leading up to his use of force. Based on what he personally observed, he properly determined that Harris presented an immediate threat of serious physical harm to innocent bystanders. Probable cause does not require 100% certainty; it requires a fair probability based on a common-sense practical judgment. *Illinois v. Gates*, 462 U.S. 213, 230 (1983).

Harris's driving created a fair probability that he would cause serious physical harm and therefore satisfied *Garner*. *Robinette*, 854 F.2d at 913-14 (under *Garner*, an officer "had probable cause to believe that . . . a suspected felon hidden inside a darkened building in the middle of the night, threatened his safety and the safety of the officers present"); *Ryder*, 814 F.2d at 1419 (under *Garner*, "the officer is allowed to infer that the suspect is inherently dangerous by the violent nature of the crime"). Any other conclusion would require law enforcement officers to either make no physical contact with a fleeing suspect at all *or* wait until a fleeing suspect is seconds away from injuring an innocent person before taking action to neutralize the threat presented. In addition to increasing the threat of harm, such a rule would promote dangerous flight as an efficient means for suspects and

their conspirators to shield contraband and other fruits of their criminal enterprise from disclosure.

The decision of the Eleventh Circuit should be reversed on substantive Fourth Amendment grounds.

III. SCOTT DID NOT VIOLATE CLEARLY ESTABLISHED LAW

If the Court concludes that Scott violated the Fourth Amendment, he would be entitled to qualified immunity because the case law provided no "fair warning" – either in March 2001 or even today – that the use of a vehicle to terminate a pursuit was unconstitutional under the circumstances presented.

A. Supreme Court Decisions

Harris suggests that the "trilogy" of *Graham-Garner-Brower* establishes the clearly established body of law that would be necessary to deprive Scott of qualified immunity. (Brief for Respondent at 31-32.) Harris's repeated invocation of *Brower* is puzzling. There, the Court found that a seizure had been alleged where the suspect's vehicle crashed into a police roadblock: "It was enough here, therefore, that, according to the allegations of the complaint, Brower was meant to be stopped by the physical obstacle of the roadblock – and that he was so stopped." *Brower*, 489 U.S. at 599. *Brower* did not analyze the *reasonableness* of the seizure: "the circumstances of the roadblock, including the allegation that headlights were used to blind the oncoming driver, may yet determine the outcome of this case." *Id.* In contrast, the issue in this case is precisely one of reasonableness. *Brower* cannot clearly

establish the law on an issue the Court expressly declined to address.

Thus, Harris is left with *Graham* and *Garner* as Supreme Court cases to resolve the "clearly established" analysis. This Court has admonished that these cases are necessarily cast at a high level of generality to take account for the fact-specific nature of the inquiry and to give allowances for reasonable mistakes as to facts or law that an officer in the field may make:

> It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.
>
> *Graham* does not always give a clear answer as to whether a particular application of force will be deemed excessive by the courts. This is the nature of a test which must accommodate limitless factual circumstances.

Saucier, 533 U.S. at 205; *cf. Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004) ("If a legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment."). The law governing excessive force in the context of automobile chases has not yet "emerge[d] in application over the

course of time." *Yarborough*, 541 U.S. at 664. Based on the few applications that did exist, Scott could have reasonably believed that his use of force was constitutional. *See, e.g., Adams v. St. Lucie County Sheriff's Dep't*, 962 F.2d 1563 (11th Cir. 1992) (Edmondson, J., dissenting), *adopted by the court en banc*, 998 F.2d 923 (11th Cir. 1993) (per curiam).

This Court's per curiam reversal of the denial of qualified immunity in *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004) (per curiam) is particularly instructive. Decided after *Hope v. Pelzer*, 536 U.S. 730 (2002), *Brosseau* found no violation of clearly established law even though the officer shot a suspect from behind, whom she thought was attempting to escape in his vehicle. While Officer Brosseau suspected that Haugen would drive in a dangerous manner based on prior conduct, Scott had probable cause to believe – if not to a certainty – that Harris would continue to drive recklessly unless and until he was stopped. Scott submits that even if his use of force is deemed unconstitutional, a grant of immunity to Officer Brosseau cannot be reconciled with a denial of qualified immunity in his case.

B. Circuit Court Decisions

Harris relies primarily on three circuit cases, (Brief for Respondent at 35-37), each of which held that firing a weapon into the passenger compartment to stop a fleeing vehicle was permitted where the violator's reckless driving threatened the safety of officers and civilians. *Scott v. Clay County*, 205 F.3d 867, 877 (6th Cir. 2000) (passenger injured by bullet fired at fleeing vehicle); *Cole v. Bone*, 993 F.2d 1328, 1330-33 (8th Cir. 1993) (driver shot in the head); *Smith v. Freland*, 954 F.2d 343, 347-48 (6th Cir.

1992) (driver shot and killed). All of these cases are from other jurisdictions, and none clearly established that Scott's conduct was unconstitutional. Indeed, binding precedent in Scott's own jurisdiction stated that "*Garner* [has] nothing to do with one car striking another or even with car chases in general." *Adams*, 962 F.2d at 1577 (Edmondson, J., dissenting), *adopted by the court en banc*, 998 F.2d 923 (11th Cir. 1993) (per curiam). As *Adams* explained,

> [a] police car's bumping a fleeing car is, in fact, not much like a policeman's shooting a gun so as to hit a person. A gun is an instrument designed for the destruction of life or the infliction of injury, and death or injury *will result* if a person is struck by a bullet. While an automobile is capable of lethality, it is not designed to kill or injure; and even when automobiles strike each other, death and injury *may well not result*. . . .

Id. In contrast, the Eleventh Circuit noted that "[a] driver – even a misdemeanant – eluding arrest in a car driven at high speeds creates a dangerous and potentially deadly force." *Id.* at 1578.

The appellate panel dismissed this reasoning by finding that "the question in *Adams* – whether the striking of a car during a police chase constituted a seizure – has been unequivocally answered in the affirmative by the Supreme Court in *Brower*." (J.A. at 71 n.5.) This statement is intriguing because whether Harris was seized is not an issue in this summary judgment proceedings. And, as discussed above, *Brower* did not reach the reasonableness of the seizure that is at issue in this case, but only found a seizure had been alleged. *Adams* itself so acknowledged: "Even in *Brower*, the Supreme Court declined to hold that

the use of a deadman roadblock there was necessarily unreasonable." 962 F.2d at 1576 (Edmondson, J., dissenting), *adopted by the court en banc*, 998 F.2d 923 (11th Cir. 1993) (per curiam).

Adams' facts are legally indistinguishable from the ones at bar, even if *Adams* is limited to a qualified immunity determination. Given the existence of binding circuit precedent, Scott submits that he should be accorded qualified immunity a fortiori even if his conduct is deemed unlawful. To hold otherwise would require police officers to be clairvoyant constitutional scholars and would invite second-guessing of court rulings, which would be a dangerous slope indeed. It would also support the notion that officers can substitute their interpretations of constitutional trends and thereby disregard binding court decisions. Such a flagrant disregard for the law should be discouraged by allowing officers to rely on precedent unless and until a court tells them otherwise.

C. Law Enforcement Policies

Lastly, Harris claims that "nationally recognized" law enforcement standards recognize "ramming" as appropriate when deadly force is authorized. (Brief for Respondent at 34-35.) Whether or not this statement is true, Scott's use of force in this particular case, and on these particular facts, did not violate this standard. Even then, police departments are free to adopt whatever limits they desire, and often are more restrictive than the Constitution might otherwise allow. Administrative policies and procedures do not (and cannot) define what is constitutional as a matter of law. That is the function of the courts. *United States v. Caceres*, 440 U.S. 741, 751-52

(1979) (noting that "violations of agency regulations . . . do not raise any constitutional questions").

Moreover, Scott followed the policies applicable in Coweta County. "Deliberate physical contact between vehicles at any time may be justified to terminate the pursuit upon the approval of the supervisor." (R. 48, Ex. 11.) Harris's law enforcement expert testified that this "judgmental policy" was in effect in the majority of jurisdictions in March 2001. (R. 37 at 54). And, as the district court found, Scott received the requisite supervisory permission to make contact with Harris's vehicle. (J.A. at 41.) Scott's adherence to departmental policy further buttresses the conclusion that he did not violate clearly established law.

D. Summary

To begin and end the qualified immunity analysis with the general statements of law, as the Eleventh Circuit has done, would effectively eliminate the application of qualified immunity to police pursuit cases, in clear violation of *Saucier*. If this Court were to determine that Scott exceeded the Fourth Amendment's standards, which Scott believes would be unwise, then *this* would be the case to establish future limitations on law enforcement activities in this precise context. Scott would necessarily be entitled to qualified immunity because the limitations were not clearly established on March 29, 2001.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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